

EDEN

Eden Environmental Citizens's Group

JAN 28 2019

60-Day Notice of Intent to Sue
December 14, 2018
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December 14, 2018

Via US Mail Certified

Kyle Wood
Vanguard Construction
1150 Hayward
Hayward, CA 94541

Billie Sposeto
FBD Vanguard Construction, Inc.
651 Enterprise Court
Livermore, CA 94550

Re: 60-Day Notice of Violations and Intent to File Suit Under the Federal Water
Pollution Control Act ("Clean Water Act")

To Officers, Directors, Operators, Property Owners and/or Facility Managers of FBD Vanguard
Construction, Inc.:

I am writing on behalf of Eden Environmental Citizens's Group ("EDEN") to give legal
notice that EDEN intends to file a civil action against FBD Vanguard Construction, Inc.
("Vanguard Construction" or "Discharger") for violations of the Federal Clean Water Act
("CWA" or "Act") 33 U.S.C. § 1251 *et seq.*, that EDEN believes are occurring at the Vanguard
Construction facility located at 1150 Hayward in Hayward, California ("the Facility" or "the
site").

EDEN is an environmental citizen's group established under the laws of the State of
California to protect, enhance, and assist in the restoration of all rivers, creeks, streams, wetlands,
vernal pools, and tributaries of California, for the benefit of its ecosystems and communities.

CWA section 505(b) requires that sixty (60) days prior to the initiation of a civil action
under CWA section 505(a), a citizen must give notice of intent to file suit. 33 U.S.C. § 1365(b).
Notice must be given to the alleged violator, the U.S. Environmental Protection Agency
("EPA"), and the State in which the violations occur.

2151 Salvio Street #A2-319 Concord, CA 94520
Telephone: 925-732-0960 Email: edenenvcitizens@gmail.com
Website: edenenvironmental.org

RECEIVED

Dec 18, 2018

As required by CWA section 505(b), this Notice of Violation and Intent to File Suit
provides notice to the Discharger of the violations which have occurred and continue to occur at
the Facility. After the expiration of sixty (60) days from the date of this Notice of Violation and
Intent to File Suit, EDEN intends to file suit in federal court against the Discharger under CWA
section 505(a) for the violations described more fully below.

I. THE SPECIFIC STANDARD, LIMITATION, OR ORDER VIOLATED

EDEN's investigation of the Facility has uncovered significant, ongoing, and continuous
violations of the CWA and the General Industrial Storm Water Permit issued by the State of
California (NPDES General Permit No. CAS000001 [State Water Resources Control Board
("SWRCB") Water Quality Order No. 92-12-DWQ, as amended by Order No. 97-03-DWQ
("1997 Permit") and by Order No. 2014-0057-DWQ ("2015 Permit") (collectively, the "General
Permit").

Information available to EDEN, including documents obtained from California EPA's
online Storm Water Multiple Application and Reporting Tracking System ("SMARTS"), indicates
that on or around September 25, 2017, the Discharger submitted a Notice of Intent ("NOI") to be
authorized to discharge storm water from the Facility. The SWRCB approved the NOI, and the
Discharger was assigned Waste Discharger Identification ("WDID") number 2 011027368.

As more fully described in Section III, below, EDEN alleges that in its operations of the
Facility, the Discharger has committed ongoing violations of the substantive and procedural
requirements of the Federal Clean Water Act, California Water Code §13377, the General Permit,
the Regional Water Board Basin Plan, the California Toxics Rule (CTR) 40 C.F.R. § 131.38, and
California Code of Regulations, Title 22, § 64431.

II. THE LOCATION OF THE ALLEGED VIOLATIONS

A. The Facility

The location of the point sources from which the pollutants identified in this Notice are
discharged in violation of the CWA is Vanguard Construction's permanent facility address of 1150
Hayward in Hayward, California.

The Vanguard Construction Facility is a portable Portland Cement concrete batch
plant. Facility operations are covered under Standard Industrial Classification Code (SIC)
3273- Ready-Mix Concrete.

Based on the EPA's Industrial Storm Water Fact Sheet for Sector E - Glass, Clay,
Cement, Concrete, and Gypsum Product Manufacturing Facilities, polluted discharges from
concrete mixing facilities such as the Facility contain pH affecting substances, metals, such as

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| ORC | ORC | ORC |
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| SCFO | SCFO | SCFO |
| WASTE | WASTE | WASTE |
| WATER | WATER | WATER |

iron and aluminum, toxic metals, such as lead, zinc, cadmium, chromium, and arsenic; chemical oxygen demand ("COD"); biochemical oxygen demand ("BOD"); total suspended solids ("TSS"); benzene, gasoline and diesel fuels; fuel additives; coolants; and oil and grease ("O&G"). Many of these pollutants are on the list of chemicals published by the State of California as known to cause cancer, birth defects, and/or developmental or reproductive harm.

B. The Affected Receiving Waters

The Facility discharges into a municipal storm drain system, which then discharges to the San Lorenzo Creek, a tributary of the San Francisco Bay ("Receiving Waters").

The San Francisco Bay is a water of the United States. The CWA requires that water bodies such as the San Francisco Bay meet water quality objectives that protect specific "beneficial uses." The Regional Water Board has issued the San Francisco Bay *Basin Water Quality Control Plan* ("Basin Plan") to delineate those water quality objectives.

The Basin Plan identifies the "Beneficial Uses" of water bodies in the region. The Beneficial Uses for the Receiving Waters downstream of the Facility include: commercial and sport fishing, estuarine habitat, fish migration, navigation, preservation of rare and endangered species, water contact and noncontact recreation, shellfish harvesting, fish spawning, and wildlife habitat. Contaminated storm water from the Facility adversely affects the water quality of the San Francisco Bay watershed and threatens the beneficial uses and ecosystem of this watershed.

Furthermore, the San Francisco Bay is listed for water quality impairment on the most recent 303(d)-list for the following: chlordane; dichlorodiphenylmethane (DDT); dieldrin; dioxin compounds (including 2,3,7,8- tetrachlorodibenzo-p-dioxin); furan compounds; invasive species; mercury; polychlorinated biphenyls (PCBs); PCBs (dioxin-like); selenium, and trash.

Polluted storm water and non-storm water discharges from industrial facilities, such as the Facility, contribute to the further degradation of already impaired surface waters, and harm aquatic dependent wildlife.

III. VIOLATIONS OF THE CLEAN WATER ACT AND GENERAL PERMIT

A. Failure to Develop, Implement and/or Revise an Adequate Monitoring and Reporting Program Pursuant to the General Permit

Section XI of the General Permit requires Dischargers to develop and implement a storm water monitoring and reporting program ("M&RP") prior to conducting industrial activities. Dischargers have an ongoing obligation to revise the M&RP as necessary to ensure compliance with the General Permit.

The objective of the M&RP is to detect and measure the concentrations of pollutants in a facility's discharge, and to ensure compliance with the General Permit's Discharge Prohibitions, Effluent Limitations, and Receiving Water Limitations. An adequate M&RP ensures that BMPs are effectively reducing and/or eliminating pollutants at the Facility, and it must be evaluated and revised whenever appropriate to ensure compliance with the General Permit.

1. Failure to Conduct Visual Observations

Section XI(A) of the General Permit requires all Dischargers to conduct visual observations at least once each month, and sampling observations at the same time sampling occurs at a discharge location.

Observations must document the presence of any floating and suspended material, oil and grease, discolorations, turbidity, odor and the source of any pollutants. Dischargers must document and maintain records of observations, observation dates, locations observed, and responses taken to reduce or prevent pollutants in storm water discharges.

EDEN alleges that between September 25, 2017, and the present, the Discharger has failed to conduct monthly and sampling visual observations pursuant to Section XI(A) of the General Permit.

2. Failure to Collect and Analyze the Required Number of Storm Water Samples

In addition, EDEN alleges that the Discharger has failed to provide the Regional Water Board with the minimum number of annual documented results of facility run-off sampling as required under Sections XI.B.2 and XI.B.11.a of Order No. 2014-0057-JDWQ, in violation of the General Permit and the CWA.

Section XI.B.2 of the General Permit requires that all Dischargers collect and analyze storm water samples from two Qualifying Storm Events ("QSEs") within the first half of each reporting year (July 1 to December 31), and two (2) QSEs within the second half of each reporting year (January 1 to June 30).

Section XI.C.6.b provides that if samples are not collected pursuant to the General Permit, an explanation must be included in the Annual Report.

As of the date of this Notice, the Discharger has failed to upload into the SMARTS database system:

- a. Two storm water sample analyses for the time period July 1, 2017, through December 31, 2017.

b. Two storm water sample analyses for the time period January 1, 2018, through June 30, 2018, and

c. Two storm water sample analyses for the time period July 1, 2018, through December 13, 2018

B. Falsification of Annual Reports Submitted to the Regional Water Board

Section XXI.L of the General Permit provides as follows:

L. Certification

Any person signing, certifying, and submitting documents under Section XXI.K above shall make the following certification:

"I certify under penalty of law that this document and all Attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system or those persons directly responsible for gathering the information, to the best of my knowledge and belief, the information submitted is, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

Further, Section XXI.N of the General Permit provides as follows:

N. Penalties for Falsification of Reports

Clean Water Act section 309(c)(4) provides that any person that knowingly makes any false material statement, representation, or certification in any record or other document submitted or required to be maintained under this General Permit, including reports of compliance or noncompliance shall upon conviction, be punished by a fine of not more than \$10,000 or by imprisonment for not more than two years or by both.

On July 6, 2018, the Discharger submitted its Annual Report for the Fiscal Year 2017-2018, respectively. The Report was signed under penalty of law by Teri Nelson. Ms. Nelson is neither the currently designated Legally Responsible Person ("LRP") for the Facility, nor a Designated Authorized Representative.

The 2017-18 Annual Report included Attachment I as an explanation for why the Discharger failed to sample the required number of Qualifying Storm Events during the reporting year for all discharge locations, in accordance with Section XI.B. Ms. Nelson certified in the report, under penalty of perjury, that the required number of samples for the reporting period was

not collected by the Facility because she claimed that no stormwater discharge occurred during the reporting year.

However, records from the National Oceanic and Atmospheric Administration (NOAA) website/database confirm that during the fiscal year 2017-18, there were sufficient Qualifying Storm Events (QSEs) occurring near the Facility during or within 12 hours of the start of regular business hours to allow the Discharger to collect the requisite number of samples.

Based on the foregoing, it is clear that Ms. Nelson made a false statement in the Facility's 2017-18 Annual Report when she indicated that the facility could not collect samples according to Section XI.B of the General Permit because there were insufficient QSEs during the reporting year.

C. Deficient BMP Implementation

Sections I.C, V.A and X.C 1.b of the General Permit require Dischargers to identify and implement minimum and advanced Best Management Practices ("BMPs") that comply with the Best Available Technology ("BAT") and Best Conventional Pollutant Control Technology ("BCT") requirements of the General Permit to reduce or prevent discharges of pollutants in their storm water discharge in a manner that reflects best industry practice, considering technological availability and economic practicability and achievability.

EDEN alleges that the Discharger has been conducting industrial activities at the site without adequate BMPs to prevent resulting non-storm water discharges. Non-storm water discharges resulting from these activities are not from sources that are listed among the authorized non-storm water discharges in the General Permit, and thus are always prohibited.

The Discharger's failure to develop and/or implement adequate BMPs and pollution controls to meet BAT and BCT at the Facility violates and will continue to violate the CWA and the Industrial General Permit each day the Facility discharges storm water without meeting BAT and BCT.

D. Discharges In Violation of the General Permit

Except as authorized by Special Conditions of the General Permit, Discharge Prohibition III(B) prohibits permittees from discharging materials other than storm water (non-storm water discharges) either directly or indirectly to waters of the United States. Unauthorized non-storm water discharges must be either eliminated or permitted by a separate NPDES permit.

Information available to EDEN indicates that unauthorized non-storm water discharges occur at the Facility due to inadequate BMP development and/or implementation necessary to prevent these discharges.

EDEN alleges that the Discharger has discharged storm water containing excessive levels of pollutants from the Facility to its Receiving Waters during at least every significant local rain event over 0.1 inches in the last five (5) years.

EDEN hereby puts the Discharger on notice that each time the Facility discharges prohibited non-storm water in violation of Discharge Prohibition III.B of the General Permit is a separate and distinct violation of the General Permit and Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a).

1. Discharges in Excess of Technology-Based Effluent Limitations

The Industrial General Permit includes technology-based effluent limitations, which prohibit the discharge of pollutants from the Facility in concentrations above the level commensurate with the application of best available technology economically achievable ("BAT") for toxic pollutants and best conventional pollutant control technology ("BCT") for conventional pollutants. (General Permit, Section X.H.)

The EPA has published Benchmark values set at the maximum pollutant concentration levels present if an industrial facility is employing BAT and BCT, as listed in Table 2 of the General Permit. The General Permit includes "Numeric Action Levels" ("NALs") derived from these Benchmark values; however, the NALs do not represent technology-based criteria relevant to determining whether an industrial facility has implemented BMPs that achieve BAT/BCT. (General Permit, Section I.M. (Finding 62))

The Discharger's exceedances of Benchmark values over the last three (3) years, identified in the table listed below, indicate that it has failed and is failing to employ measures that constitute BAT and BCT, in violation of the requirements of the Industrial General Permit. EDEN alleges and notifies the Discharger that its storm water discharges from the Facility have consistently contained and continue to contain levels of pollutants that exceed Benchmark values as listed below.

These allegations are based on the Facility's self-reported data submitted to the Regional Water Board. Self-monitoring reports under the Permit are deemed "conclusive evidence of an exceedance of a permit limitation." *Sierra Club v. Union Oil*, 813 F.2d 1480, 1492 (9th Cir. 1988).

The Discharger's ongoing discharges of storm water containing levels of pollutants above EPA Benchmark values and BAT- and BCT-based levels of control also demonstrate that it has not developed and implemented sufficient BMPs at the Facility. EPA Benchmarks are relevant to the inquiry as to whether a facility has implemented BMPs. [*Cal. Sportfishing Pro. Alliance v. River City Waste Recyclers, LLC* (E.D. Cal. 2016) 205 F Supp 3d 1128; *Baykeeper v. Kromer Metals, Inc.* (C.D. Cal. 2009) 619 F Supp.2d 914, 925; *Waterkeepers Northern California v. JG Industrial Mfg. Inc.* (9th Cir. 2004) 375 F.3d 913, 919 (concentration levels in excess of EPA

benchmarks are evidence supporting the citizen plaintiff's contention that defendant did not have appropriate BMPs to achieve BAT/BCT.]

The Discharger's failure to develop and/or implement adequate BMPs and pollution controls to meet BAT and BCT at the Facility violates and will continue to violate the CWA and the Industrial General Permit each and every day the Facility discharges storm water without meeting BAT and BCT.

E. Failure to Comply with Facility SWPPP

The Facility SWPPP indicates that Vanguard Construction will collect and analyze storm water samples from two qualified storm events within the first half of each reporting year (July 1 to December 31) and two QSTs within the second half of each reporting year (January 1 to June 30).

As detailed above, the Facility missed QSE samples in the reporting years 2017-18 and 2018-19.

The Discharger may have had other violations that can only be fully identified and documented once discovery and investigation have been completed. Hence, to the extent possible, EDEN includes such violations in this Notice and reserves the right to amend this Notice, if necessary, to include such further violations in future legal proceedings.

The violations discussed herein are derived from eye witness reports and records publicly available. These violations are continuing.

IV. THE PERSON OR PERSONS RESPONSIBLE FOR THE VIOLATIONS

The entities responsible for the alleged violations are FBD Vanguard Construction, Inc., as well as employees of the Discharger responsible for compliance with the CWA.

V. THE DATE, DATES, OR REASONABLE RANGE OF DATES OF THE VIOLATIONS

The range of dates covered by this 60-day Notice is from at least September 25, 2017, to the date of this Notice. EDEN may from time to time update this Notice to include all violations which may occur after the range of dates covered by this Notice. Some of the violations are continuous in nature; therefore, each day constitutes a violation.

VI. CONTACT INFORMATION

The entity giving this 60-day Notice is Eden Environmental Citizen's Group ("EDEN").

Aiden Sanchez

EDEN ENVIRONMENTAL CITIZEN'S GROUP

2151 Salvia Street #A2-319

Concord, CA 94520

Telephone: (925) 732-0960

Email: Edenenvcitizens@gmail.com (emailed correspondence is preferred)

Website: edenenvironmental.org

To ensure proper response to this Notice, all communications should be addressed to EDEN's General Counsel, Hans W. Herb.

HANS W. HERB

Law Offices of Hans W. Herb

P.O. Box 970

Santa Rosa, CA 95402

Telephone: (707) 576-0757

Email: hans@hankman.com

VII. RELIEF SOUGHT FOR VIOLATIONS OF THE CLEAN WATER ACT

As discussed herein, the Facility's discharge of pollutants degrades water quality and harms aquatic life in the Receiving Waters. Members of EDEN live, work, and/or recreate near the Receiving Waters. For example, EDEN members use and enjoy the Receiving Waters for fishing, boating, swimming, hiking, biking, bird watching, picnicking, viewing wildlife, and/or engaging in scientific study. The unlawful discharge of pollutants from the Facility impairs each of these uses.

Further, the Facility's discharges of polluted storm water and non-storm water are ongoing and continuous. As a result, the interests of EDEN's members have been, are being, and will continue to be adversely affected by the failure of the Discharger to comply with the General Permit and the Clean Water Act.

CWA §§ 505(a)(1) and 505(f) provide for citizen enforcement actions against any "person," including individuals, corporations, or partnerships, for violations of NPDES permit requirements and for un-permitted discharges of pollutants. 33 U.S.C. §§ 1365(a)(1) and (f), §1362(5).

Pursuant to Section 309(d) of the Clean Water Act, 33 U.S.C. § 1319(d), and the Adjustment of Civil Monetary Penalties for Inflation, 40 C.F.R. § 19.4, each separate violation of the Clean Water Act subjects the violator to a penalty for all violations occurring during the period commencing five (5) years prior to the date of the Notice Letter. These provisions of law authorize civil penalties of \$37,500.00 per day per violation for all Clean Water Act violations after January 12, 2009, and \$51,570.00 per day per violation for violations that occurred after November 2, 2015.

In addition to civil penalties, EDEN will seek injunctive relief preventing further violations of the Clean Water Act pursuant to Sections 505(a) and (d), 33 U.S.C. § 1365(a) and (d), declaratory relief, and such other relief as permitted by law. Lastly, pursuant to Section 505(d) of the Clean Water Act, 33 U.S.C. § 1365(d), EDEN will seek to recover its litigation costs, including attorneys' and experts' fees.

VIII. CONCLUSION

The CWA specifically provides a 60-day notice period to promote resolution of disputes. EDEN encourages the Discharger's counsel to contact EDEN's counsel within 20 days of receipt of this Notice to initiate a discussion regarding the violations detailed herein.

During the 60-day notice period, EDEN is willing to discuss effective remedies for the violations; however, if the Discharger wishes to pursue such discussions in the absence of litigation, it is suggested those discussions be initiated soon so that they may be completed before the end of the 60-day notice period. EDEN reserves the right to file a lawsuit if discussions are continuing when the notice period ends.

Very truly yours,

AIDEN SANCHEZ

Eden Environmental Citizen's Group

Copies to:

Administrator
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Executive Director
State Water Resources Control Board

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